B. K. LOWNDES ET AL.

IBLA 88-248 Decided March 14, 1990

Appeal from a decision of the Colorado State Office, Bureau of Land Management, affirming issuance of a notice of noncompliance with respect to operations on certain millsite claims (C MC 198111 through C MC 198134). (CO 53-83-16N)

Affirmed.

1. Federal Land Policy and Management Act of 1976: Surface Management--Millsites: Generally--Mining Claims: Surface Uses

   Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that the mining claimants and the operators have failed to operate in such a manner as to prevent undue or unnecessary degradation or to complete reclamation of a millsite to the standards set forth in 43 CFR 3809.1-3.

APPEARANCES: B. K. Lowndes, Consultant, Colorado Gold U.S.A., Inc., pro se; Stephen D. Karp, Vice President-Finance, Grasslake Minerals and Mining, Inc., pro se; Henry E. Schoo, Vice President-Mining, Grasslake Minerals and Mining, Inc., pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

B. K. Lowndes, Henry E. Schoo, and Stephen D. Karp have appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated December 17, 1987, affirming the issuance by the Northeast Resource Area Manager (NERA) of a notice of noncompliance with respect to operations on certain Grasslake millsite claims (C MC 198111 through C MC 198134) located within the NW¼ sec. 34 and the NE¼ sec. 33, T. 3 S., R. 72 W., sixth principal meridian, Clear Creek County, Colorado.

The record shows that Henry Schoo, through Grasslake Minerals and Mining, Inc. (GMM), originally filed location notices for 36 Grasslake millsite claims in 1983 and submitted an intent to hold the claims with BLM in 1984. On October 18, 1983, Schoo filed a notice of intention for a plan of operations with BLM (CO 53-83-16N) for the Grasslake Custom Gold processing site, indicating the proposed operations at the millsite would consist of a "custom heap leach processing mill or 'quartz reduction works'" to process ore from mines and mill dumps located throughout Gilpin and Clear Creek Counties. The plan listed GMM as the operator and indicated the development effort planned for 1983 was primarily the construction of an access haulage road into the millsite and a small scale testing facility.

Schoo noted that in each calendar year a total cumulative surface disturbance of 5 acres or less would be maintained. Further, as to proposed reclamation, the plan specifically acknowledged:

> A. Reclamation of all areas disturbed will be completed to the standard described in Section 3809.1-3(d) of the 43 CFR 3809 regulations and reasonable measures will be taken to prevent unnecessary or undue degradation of the federal lands during operations.
>
> B. The access road over any unpatented mining claim land will be left open to provide access to public and private land unless the BLM District Manager or his representative consider any other reclamation recommendation in the best interest of the public.

GMM began construction of the access road in the fall of 1983 after which BLM inspected the millsites and informed GMM that as of December 22, 1983, the company was to take steps to waterbar the road with deep and frequently spaced waterbars, to trench all fills across drainages, and to revegetate all disturbed areas. BLM pointed out that these steps were necessary to avoid "unnecessary or undue degradation" of Federal lands and were designed to help reduce soil erosion and stream sedimentation. 1/

In addition to the mining plan of operations, GMM applied for and was granted a mining and reclamation permit (M-84-074) by the State of Colorado Mined Land Reclamation Division (CMLRD) in August of 1984. The permit listed GMM as both the operator and holder of possessory interest for milling purposes and noted BLM as owner of record of the millsite mining claims involving the affected land surface. Because CMLRD was concerned about disturbances to hydrologic balance and reclamation and rehabilitation of the surface disturbance, bond was set at $17,500.

The record further indicates that GMM entered into a contract of sale with Colorado Gold U.S.A., Inc. (CGU), in the spring of 1985 for the purchase of the assets of GMM, including the interests in the millsites. On April 25, 1985, CMLRD approved the transfer of the State permit to CGU as the recognized operator responsible for following the conditions of the permit. Subsequently, CGU obtained a reduction of the bond to $8,000. Although GMM undertook this detailed arrangement to transfer its assets and change the operator of the millsite, no official notification of this change was transmitted to BLM.

BLM and the Colorado State Division of Wildlife conducted inspections of the millsite intended for the cyanide leach operation in November 1984. These inspections revealed that no further work had been performed at the

1/ Letter dated Jan. 4, 1984, from the Area Manager, NERA, to GMM specifically outlining three steps that the company had been asked to undertake to protect the Federal lands in their operation.

site after 1983 other than the initial dozing of the site. Both agencies found evidence of severe erosion, absence of vegetation, and sediment in
the creek. On December 10, 1984, BLM notified CMLRD of the lack of further development by GMM and of the existing condition of "unnecessary and undue degradation" of the public land. Citing a memorandum of understanding between BLM and the CMLRD of June 28, 1984, in which the Colorado State agency had agreed to help BLM enforce BLM's surface management regulations in 43 CFR 3809, BLM asked the agency to pursue any action necessary to assure that GMM complied with the regulations. 2/

After meetings at the site with BLM, CMLRD, and Henry Schoo of GMM, several remedies were suggested for GMM to counter erosion and revegetation problems. Recommendations were made for waterbars, filling washouts, contour plowing, and revegetation of eroding areas. Further, technical revisions were approved for the State permit on November 25, 1985, to include stipulations providing specific steps to minimize on-site erosion. When the stipulated measures were not carried out the problems persisted and a cease and desist order requiring corrective action was issued by the State Mined Land Reclamation Board. After a formal hearing was held before that Board confirming the deterioration of the site, the Board ordered revocation of the state permit and surety bond forfeiture by CGU January 21, 1987.

When BLM made further examination and review on August 21, 1987, documenting approximately 4.9 acres of severe surface disturbance since 1983, it noted that the site had continued to deteriorate, the millsite project had been abandoned, and that it was apparent the $8,000 reclamation bond would be insufficient to reclaim the millsites. The record shows BLM had estimated the total cost of reclamation as of September 1987 at $30,444. Therefore, BLM's NERA office issued the Notice of Noncompliance to CGU, dated July 7, 1987, citing violations of 43 CFR 3890.1-3 and 3809.3-7, in an attempt to get the site completely reclaimed. The notice was sent to all parties involved with the millsites including GMM, CGU, and parties of record affiliated with these companies.

The parties involved appealed from this notice to the Colorado
State Director who affirmed the NERA determination by a decision dated December 17, 1987. The State Director found that it was reasonable and proper for NERA to issue the notice of noncompliance to all involved
parties and to require notice to BLM of the change in operator and reclamation of the site, stating:

> It is quite apparent from the facts contained in the record that your activity has disturbed a significant area. The site, including the access road, was poorly constructed by you, and has not been properly maintained and stabilized since 1983. Consequently, on-site and off-site environmental damage has occurred and continues because of uncontrolled runoff and severe erosion.

2/ The letter cites a memorandum of understanding between the two
agencies, dated June 28, 1984, in which section V.2 refers to inspections and section VI.1 refers to CMLRD enforcement.

> Your 1983 proposed cyanide heap leaching operation has never materialized. The 4.9-acre site has been and continues to be inactive.
>
> Your Colorado Mined Land Reclamation Division (CMLRD) Permit to Mine was revoked and the $8,000 bond forfeited on January 20, 1987. To date, CMLRD has not accomplished any reclamation at your site.
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> The federal regulations (43 CFR 3809) that you were working under require that operations be conducted in a usual, customary, and proficient manner so as to prevent unnecessary and undue degradation of the federal lands involved. You have failed to operate in such a way and environmental damage has occurred. The above regulations also require site maintenance and stabilization during periods of nonoperation and complete reclamation after an extended period of nonoperation. The absence of any milling activity for more than four years is certainly an "extended period of nonoperation."

B. K. Lowndes has appealed the decision as it applies to him, assert-ing he was merely a consultant and not an employee for a now defunct entity, CGU. Although CGU originally contracted to acquire the assets of GMM, he asserts they were unable to acquire financing, everything reverted to GMM, and contractually the permit remained with the operator, GMM.

Henry Schoo asserts in his statement of reasons, inter alia, that a great deal of effort has been made since 1982 concerning the reclamation
of these claims and that at every juncture GMM has carried out the interim instructions of the CMLRD and BLM to reclaim and reseed the millsite area. However, he indicates that these two agencies at different times could not seem to agree on the proper course of action for his company to follow for reclamation. He asserts he was given a permit to remove dead and down trees in September 1986, but an adjoining property owner would not allow necessary access for equipment. He disclaims further responsibility for
the reclamation pointing to CGU as the operator that has been accepted and acknowledged by CMLRD, and therefore, the entity liable for reclamation.
He also argues that 4.9 acres out of a total of a 163-acre area cannot be considered a "significant area." He disagrees with BLM's finding that runoff and erosion have caused offsite damage. He asserts that BLM and the CMLRD are the cause of the delay in the mining use of this land, concluding that temporary reclamation work would be of no significance.

Stephen D. Karp has appealed the BLM decision, asserting that GMM has always tried to comply with the reclamation demands of both BLM and CMLRD. He argues that since no further construction or excavation work has been performed since CGU's bond was reduced to $8,000, "the forfeited bond held by CMLRD must still be considered sufficient to cover the costs of the reclamation work." He indicates both he and Schoo are still interested in working the claims, stating: "Once adequate funding is in place, GMM will be able to follow through on its plans for construction and reclamation and renew a successful co-operative effort with the BLM and CMLRD."

[1] In managing the public lands the Secretary of the Interior is mandated by law to "take any action necessary to prevent unnecessary or undue degradation of the lands." Federal Land Policy and Management Act of 1976 (FLPMA), section 302(b), 43 U.S.C. § 1732(b) (1982); see Draco Mines Inc., 75 IBLA 238 (1983). This provision was expressly recognized in section 302(b) of FLPMA as affecting the rights of claimants under the Mining Law of 1872. The surface management regulations of 43 CFR Subpart 3809 were promulgated pursuant to this authority. Differential Energy, Inc., 99 IBLA 225 (1987).

In monitoring the activities involved in appellants' millsite operations, BLM has properly acted in this situation to carry out the Secretary's mandate as indicated in the law and the surface management regulations to prevent unnecessary or undue degradation of this area of public land. BLM's actions to this point can only be viewed as a necessary and proper effort
to carefully follow the express objectives of the regulations set forth in 43 CFR 3809.0-2 as follows:

> The objectives of this regulation are to:
>
> (a) Provide for mineral entry, exploration, location, operations, and purchase pursuant to the mining law in a manner that will not unduly hinder such activities but will assure that these activities are conducted in a manner that will prevent unnecessary or undue degradation and provide protection of nonmineral resources of the Federal lands;
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> (b) Provide for reclamation of disturbed areas; and
>
> (c) Coordinate, to the greatest extent possible, with appropriate State agencies, procedures for prevention of unnecessary or undue degradation with respect to mineral operations.

Moreover, where the evidence is such, as in this case, that the operator has failed to prevent undue or unnecessary degradation or to complete reclamation to the standards described in 43 CFR 3809.1-3, BLM properly may issue a notice of noncompliance as described in 43 CFR 3809.3-2.

The burden of proof is on an appellant to show error in the decision appealed from; in the absence of such a showing, the decision will
be affirmed. Wells J. Horvereid, 88 IBLA 345 (1985). Where, as in the present case, a party appeals from a BLM determination affirming a notice
of noncompliance under 43 CFR 3809.3-2, it is the obligation of the appellant to show that the determination is incorrect. Unless a statement of reasons shows adequate basis for appeal and appellant's allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. Howard J. Hunt, 80 IBLA 396 (1984). Where BLM determines that the surface disturbance caused by appellants' millsites
had caused unnecessary or undue degradation of the lands, and appellants challenge that determination, the burden is on appellants to show that
the situation does not exist.

From our consideration of the case at this juncture we can only conclude that there is more than adequate basis for BLM's action. The record is replete with evidence compiled by both BLM and the State agency verifying the severity of the on-site erosion situation requiring immediate remedial action. Although appellants assert they have attempted to cooperate with BLM and CMLRD in revegetation with grass seed at various intervals since 1983, this obviously is far short of what is necessary to prevent further degradation to the land. In addition, even though they may have made a sincere effort to correct some of the problems in the past, the deterioration described by various inspection reports in 1986 and 1987 is clearly a continuous and worsening condition that can only become more severe and expensive to correct if left unchecked any longer.

Unfortunately, much of appellants' discussion of their efforts to comply with BLM and State requirements, and the defense of their inability to do more, merely emphasizes their lack of compliance due to the financial difficulties of CGU and the asserted need for restructuring of funding for GMM. Appellants have presented nothing with this appeal to persuade us
that BLM has erred in its finding of undue or unnecessary degradation of the Federal lands involved in this case, nor of the impropriety of the notice of noncompliance.

Although the State has acted to forfeit the reclamation bond and cancel the State permit, the State action does not deprive BLM of doing whatever
it can to seek its own remedy of immediate reclamation. The State findings were not binding on BLM, which is under the statutory and regulatory duty
to prevent further damage. 43 CFR 3809.0-3(b); see FLPMA, § 302, 43 U.S.C. § 1732 (1982). BLM has acted to coordinate its efforts with the State per 43 CFR 3809.0-2. However, in view of the failure of claimants to carry out the State's requirements, BLM acted properly to cite all parties for the appropriate violation of the regulations.

Accordingly, since appellants have failed to meet their burden of proof, the decision to affirm the notice of noncompliance must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge